No. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM J. BOURJAILY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801(d)(2)(E), the court must determine by independent evidence: a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy?

2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based?

3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae files this brief with the consent of Petitioner William J. Bourjaily through counsel James R. Willis and Respondent United States of America, Charles Fried, Solicitor General. The

letters of consent from both parties are on file with the Clerk of the United States Supreme Court.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 4,000 lawyers, including representatives of every state. The membership consists of trial and appellate advocates, law professors and judges who are concerned with protecting the constitutional and statutory rights of the accused. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment rights. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to the fundamental fairness of the trial of conspiracy cases and the preservation of the Sixth Amendment Confrontation Clause

that NACDL should offer its assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioner in this case was convicted of two offenses, possession with intent to distribute cocaine and conspiracy to distribute cocaine, in violation of Title 21, United States Code, §§ 841(a)(1) and 846. These convictions were based, in large part, on evidence consisting of taped conversations between a government informant, who supplied the cocaine, and petitioner's co-defendant. United States v. Bourjaily, 781 F.2d 539, 544-45 (6th Cir. 1986). None of these conversations made any reference to the petitioner by name or description. No direct evidence was presented that petitioner ever

communicated with either party to these conversations. Id. at 541.

Nevertheless, the taped conversations were admitted over objection as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E). The trial court utilized the "preponderance of the evidence" standard in making this determination. However, the court improperly relied on the content of the statements themselves as evidence that the petitioner and the declarant were members of the same conspiracy. Id. at 542. The court also failed to determine whether the statements bore sufficient indicia of reliability to satisfy the Sixth Amendment Confrontation Clause.

Proper administration of Fed. R. Evid. 801(d)(2)(E), especially in criminal trials, demands that the trial court find by independent evidence that

the defendant and the out-of-court declarant were members of the same conspiracy, before admitting any co-conspirator declarations at trial. This finding should be supported by at least a "preponderance of the evidence." The court is also constitutionally obligated to determine whether the statements are reliable enough to satisfy the Confrontation Clause of the Sixth Amendment. These precautions are dictated by practical, as well as constitutional, considerations.

ARGUMENT

1. THE DETERMINATION THAT THE DEFENDANT AND DECLARANT WERE MEMBERS OF THE SAME CONSPIRACY MUST BE BASED ON EVIDENCE INDEPENDENT OF THE STATEMENTS THEMSELVES.

The text and underlying rationale of Rule 801(d)(2)(E) establish that admissibility of statements under the

rule depends on the existence of a distinct factual predicate.[1] Consequently, before a statement is admissible under the rule, it must be shown that a conspiracy existed, that both the defendant and the declarant were members of the same conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy. If these conditions precedent are not satisfied, the rule does not come into play, and the statements fall into the general category of hearsay, when offered for the truth of the matter asserted. Fed. R. Evid. 801(c).

The fundamental rationale for

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[1]/ Fed. R. Evid. 801(d)(2)(E) provides that: (d) A statement is not hearsay if--(2) the statement is offered against a party and is (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

treating co-conspirator declarations as nonhearsay is really a fiction. See Advisory Committee Notes, Fed. R. Evid. 801(d)(2)(E); 28 U.S.C. app. § 718. Extending the logic of other rules which provide for the admissibility of "vicarious admissions," the co-conspirator exception is likewise grounded in principles of agency. According to these principles, a member of a joint venture authorizes or adopts any statements made by other members of the group in furtherance of the joint venture's objectives. Id.

The agency rationale disappears altogether if it cannot be shown that the defendant and the declarant were members of the same joint venture or conspiracy. Several cogent reasons require exclusion of the content of the statements themselves from this factual inquiry.

The most compelling reason for requiring this determination to be made on the basis of independent evidence is that to do otherwise would constitute unjustified "bootstrapping." Glasser v. United States, 315 U.S. 60, 75 (1942). A plain reading of the rule itself demonstrates that a purported co-conspirator statement is incompetent hearsay unless it is shown that the defendant and declarant were, in reality, co-conspirators. Even if details contained in the out-of-court assertions are subsequently "verified," those details still constitute pure hearsay, and should play no role in vouching for the nonhearsay status of the statement. See United States v. Coe, 718 F.2d 830, 836 (7th Cir. 1983). Besides being an exercise in tautology, such a practice gives undue weight to the out-of-court

assertions, which lack any intrinsic guarantees of trustworthiness.

In particular, the court is left with no way of measuring the accuracy, sincerity or intended meaning of those assertions. Moreover, when the hearsay assertions are allowed to help establish the factual predicate for their own admission, the quantum of proof required to show admissibility is blurred. Where the statements directly implicate the defendant in the conspiracy, these statements will unavoidably be heavily weighted in making the preliminary determination. Thus, the likelihood that a statement will be mistakenly admitted due to hearsay infirmities in its foundation rises in proportion to the amount of prejudice it would cause the defendant at trial. This runs contrary to the principle that the more "crucial"

or "devastating" the out-of-court statement, the closer scrutiny it merits. Dutton v. Evans, 400 U.S. 74, 87 (1970).

Other reasons exist for mandating independent proof that the defendant and declarant were members of the same conspiracy. The circuit courts of appeals are virtually unanimous in their approval of this requirement.[2] Only the

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[2] See, e.g., United States v. Nardi, 633 F.2d 972, 974 (1st Cir. 1980); United States v. Garcia-Duarte, 718 F.2d 42, 45 (2d Cir. 1983); United States v. Ammar, 714 F.2d 238, 247 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Jackson, 757 F.2d 1486, 1490 (4th Cir.), cert. denied, 106 S. Ct. 407 (1985); United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Coe, 718 F.2d 830, 835 (7th Cir. 1983); United States v. Massa, 740 F.2d 629, 637-38 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); United States v. Perez, 658 F.2d 654, 659 (9th Cir. 1981); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984); United States v. Zielie, 734

Sixth Circuit accepts the practice of crediting the statement's content in making the preliminary finding.[3] See, e.g., United States v. Piccolo, 723 F.2d 1234, 1240 & n.1 (6th Cir. 1983) (en banc), cert. denied, 466 U.S. 970 (1984); United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978). In fact,

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F.2d 1447, 1457 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Weisz, 718 F.2d 413, 433 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984).

[3]/ The First Circuit has given limited credit to this practice where there is significant independent evidence of the existence of the conspiracy and where the statement sought to be admitted simply corroborates inferences which can be drawn from the independent evidence. United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978). The general practice of the First Circuit is to require proof of the existence of the conspiracy by a preponderance of independent nonhearsay evidence. See United States v. Nardi, 633 F.2d 972 (1st Cir. 1980).

several circuits would exclude the statement from the entire fact-finding process required by Rule 801(d)(2)(E).[4] Whether or not a statement furthers the objectives of a given conspiracy necessarily depends on the content of the statement itself. The question of whether the defendant and the declarant were engaged in a common conspiracy should not be answered by reference to out-of-court assertions which cannot be meaningfully challenged or explored by the defendant.

Establishing a clear "independent

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[4]/ See, e.g., United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984); United States v. Zielie, 734 F.2d 1447, 1457 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Gantt, 617 F.2d 831, 844 (D.C. Cir. 1980).

evidence" rule would promote uniformity and consistency among the circuits on this question, as well as resolve uncertainty within individual circuits like the First and Sixth. Conversely, to allow the statements in to prove their own admissibility would reverse long-standing law in at least nine circuits. In addition, this Court has previously recognized that the preliminary findings required by Rule 801(d)(2)(E) should be based on "substantial independent evidence." United States v. Nixon, 418 U.S. 683, 701 n.14 (1974).

Such a rule also imposes no unreasonable burden on the prosecution. The government is still free to prove that conversations took place between certain individuals under certain circumstances without using the substance of the conversations. The government is

also free to use other forms of relevant evidence which may be inadmissible at trial, such as affidavits or other reliable hearsay. See Fed. R. Evid. 104(a). Finally, several circuits allow the government to make a preliminary showing of admissibility, then conditionally introduce the statements subject to a full showing that they meet the requirements of Rule 801(d)(2)(E).[5] This procedure avoids having the government present duplicate or awkwardly ordered proof at trial. Where a conspiracy has been charged, the

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[5] See, e.g., United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); United States v. Ammar, 714 F.2d 238, 247 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984).

testimony may be conditionally admitted with an instruction that the jury is not to consider it until a conspiracy is found beyond a reasonable doubt. Thus, if a no-conspiracy finding is later made, the jury must be instructed to ignore the specific items of testimony conditionally admitted. E.g., United States v. Gere, 662 F.2d 1291, 1294 (9th Cir. 1981).

In short, the government has ample opportunity to present independent evidence that the defendant and declarant were co-conspirators without resorting to the self-referential process of allowing untried hearsay to prove the conditions of its own admissibility.

2. THE DETERMINATION THAT THE DEFENDANT AND DECLARANT WERE MEMBERS OF THE SAME CONSPIRACY MUST BE MADE BY A PREPONDERANCE OF THE EVIDENCE.

Like the requirement of "independent evidence," the requirement that the

factual predicate for admitting statements under the co-conspirator exception be established by a "preponderance of the evidence" is strictly followed in most of the circuits.[6] Similar considerations and authority justify the application of the preponderance standard to the Rule 801(d)(2)(E) inquiry.

First, compliance with the rule

6/ United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Garcia-Duarte, 718 F.2d 42, 45 (2d Cir. 1983); United States v. Ammar, 714 F.2d 238, 250 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Enright, 579 F.2d 980, 986 (6th Cir. 1978); United States v. Coe, 718 F.2d 830, 835 (7th Cir. 1983); United States v. Massa, 740 F.2d 629, 637-38 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984).

itself is not assured by a lesser standard of proof. If statements could be admitted upon a prima facie showing, then statements which are "more likely than not" beyond the scope of the rule would still be presented to the jury. This is especially true given the wide scope of evidence the court may consider in making its preliminary finding. Fed. R. Evid. 104(a); see United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). The prospect of an over-inclusive co-conspirator rule threatens the balance between adversary interests embodied in the rule.

Courts have also suggested that the language of Rule 104(a), which requires the trial judge to "determine" preliminary questions of admissibility,

compels a "preponderance of the evidence" standard. See, e.g., United States v. Andrews, 585 F.2d 961, 966 (10th Cir. 1978); Petrozziello, 548 F.2d at 23. Moreover, the trial courts are by now familiar with the application of this standard in the context of determining the voluntariness of a confession. Lego v. Twomey, 404 U.S. 477 (1972). Recently this Court set the "preponderance of the evidence" standard as the quantum of proof necessary to show a waiver of Miranda rights as well. Colorado v. Connelly, No. 85-660 (U.S. 10 December 1986).

In light of the near unanimous acceptance of the preponderance standard by the circuit courts, and the apparently workable nature of that standard, this Court should take the opportunity to affirm the recognized standard and

establish a "preponderance of the evidence" standard for all 801(d)(2)(E) inquiries.[7]

As argued above, establishing a clear burden of proof under Rule 801(d)(2)(E) would create desirable uniformity among the circuits on this recurring issue. That most of the circuits have already adopted a preponderance standard suggests that it is the practical and workable method of administering Rule 801(d)(2)(E), both at the trial and appellate levels. The availability of harmless error analysis remains to guard against unjustified reversals of criminal convictions. More

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7/ Respondent appears to agree that "preponderance of the evidence" is the standard. See Brief for United States in Opposition to Petition for Writ of Certiorari, argument 1.a.

importantly, the preponderance standard is the only burden of proof consistent with the trial court's function of screening out unreliable or unfairly prejudicial evidence. Under a lesser standard, this function cannot be meaningfully exercised, and unjust convictions will inevitably result.

There was simply no evidence, independent of the statements, of a conspiracy in petitioner's case. As respondent concedes in its Brief in Opposition to the Petition for a Writ of Certiorari, neither the buyer nor the seller of narcotics can be guilty of a conspiracy and because Greathouse was a government informant there could not be a conspiracy between Greathouse and Lonardo, petitioner's co-defendant. Lonardo's delivery of the cocaine to petitioner's car and petitioner's

possession of $21,000 likewise does not establish a conspiracy but rather that petitioner was either the purchaser or an "aider and abettor." See 18 U.S.C. § 2. Aiding and abetting and conspiracy are separate crimes. Nye & Nissen v. United States, 336 U.S. 613 (1949); Sealfon v. United States, 332 U.S. 575 (1948); see, e.g., United States v. Van Brandy, 726 F.2d 548 (9th Cir.), cert. denied, 469 U.S. 839 (1984) (defendant convicted of aiding and abetting bank robbery but acquitted of conspiracy to rob the bank). Petitioner was in fact convicted of possession with intent to distribute cocaine.

3. COURTS ARE CONSTITUTIONALLY OBLIGATED TO DETERMINE WHETHER CO-CONSPIRATOR STATEMENTS ADMISSIBLE UNDER FED. R. EVID. 801(d)(2)(E) ARE SUFFICIENTLY RELIABLE TO COMPORT WITH THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

In United States v. Inadi, 106 S.

Ct. 1121 (1986), this Court left open the question of whether the admission of co-conspirator statements under Rule 801(d)(2)(E) may nevertheless violate the Confrontation Clause, absent a showing that the statements are reliable. Id. at 1124 n.3. This really presents two questions. First, are co-conspirator statements inherently reliable such that their admission can never violate the Confrontation Clause? Second, if co-conspirator statements are not inherently reliable, is there any justification other than reliability which supports dispensing with the protections afforded by the Confrontation Clause in the context of co-conspirator statements?

The contention that co-conspirator statements are inherently reliable is not widely maintained, and ignores con-ventional wisdom about the conduct and

perpetrators of criminal conspiracies. It has been recognized that:

> The unreliability of co-conspirator declarations as trial evidence is not merely a product of the duplicity with which criminals often conduct their business. It also stems from the ambiguities that so often appear in all casual conversations, not just those of outlaws. [Citations omitted.] And the difficulties one has in making sense of slang and dialect can be compounded where conspirators use private codes . . . .

Inadi, 106 S. Ct. 1121, 1132 (Marshall, J., dissenting); see Bruton v. United States, 391 U.S. 123, 141-42 (1968) (co-defendant statements "intrinsically much less reliable" than other forms of hearsay and have been traditionally viewed with special suspicion (White, J., dissenting)).

The duplicity and ambiguity which characterize criminal enterprises bears further comment. Despite the existence

of identifiable goals, many conspiracies are marked by intense competition, mutual distrust and fear of being discovered. Each of these factors can motivate the individual conspirator to mischaracterize his actions and beliefs. Moreover, since the conduct is already criminal, many of the disincentives associated with being dishonest in the context of a legitimate business venture do not exist in the context of a conspiracy. Thus, there is strong reason to doubt the reliability of communications between co-conspirators, more so than communications between ordinary business partners.

This case is a perfect example of the inherent unreliability of alleged co-conspirator statements. Here, the statements of Lonardo were both crucial to the government and devastating to the defense in that they were the only

evidence suggesting involvement by a multiple layer of buyers. In addition, they were made by a person (Lonardo) with a motive to lie and an interest in stringing Greathouse along in order to make an ultimate purchase. The statements did not refer to anyone by name or offer any description of the purported purchasers sufficient to allow any independent corroboration of their truth.

Declarations Against Interest

Some courts have attempted to skirt the issue by treating all co-conspirator statements as "declarations against interest," which are "presumptively reliable." See Fed. R. Evid. 804(b)(3); United States v. Paone, 782 F.2d 386, 391 (2d Cir.), cert. denied, 107 S. Ct. 269 (1986); United States v. Dunn, 758 F.2d 30, 39 (1st Cir. 1985); cf. United States

v. Perez, 658 F.2d 654, 662 (9th Cir. 1981) (court considers whether statement is against interest as part of reliability inquiry). The argument that co-conspirator declarations are necessarily reliable as "declarations against interest" results from an overbroad reading of Fed. R. Evid. 804(b)(3). First, if Rule 801(d)(2)(E) were intended as a discrete subset of declarations against interest, there would be no reason to have the rule. In Lee v. Illinois, 106 S. Ct. 2056, 2064 n.5 (1986), this Court rejected the state's categorization of the hearsay confession of the co-defendant as a simple declaration against interest finding that "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis." Second, probably just a small fraction of co-conspirator statements

would actually fall within Rule 804(b)(3). Statements made in furtherance of a conspiracy necessarily serve the declarant's interest in achieving the conspiracy's objectives. However incriminating the statements may be, the presence of an alternative motivation for making them distinguishes them from pure declarations against interest, which are presumptively reliable.

Firmly Rooted Hearsay Exception

Other courts have held that co-conspirator statements "fall within a firmly rooted hearsay exception," from which reliability can be inferred. See Ohio v. Roberts, 448 U.S. 56, 66 (1979) (general statement of the rule); see also United States v. McLernon, 746 F.2d 1098, 1106 (6th Cir. 1984); United States v. Xheka, 704 F.2d 974, 987 n.7 (7th

Cir.), cert. denied, 464 U.S. 993 (1983); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983). However, it must be recognized that the Confrontation Clause and the hearsay rule are not co-extensive and that admitting an out-of-court statement into evidence may still violate the Confrontation Clause even though the evidence falls within a recognized hearsay exception. Dutton v. Evans, 400 U.S. 74, 82, 86 (1970); California v. Green, 399 U.S. 149, 155-56 (1970). In Lee v. Illinois, 106 S. Ct. 2056 (1986), the Court held that a co-defendant's hearsay confession inculpating the defendant was inadmissible under the Confrontation Clause because it was unreliable. Co-conspirator statements are shrouded by similar concerns of unreliability in that often such

statements involve the use of codes, boasting, threats or other language designed to encourage involvement of potential co-conspirators. "Honesty among thieves" cannot be presumed and should certainly not form a presumptive basis of reliability. It is not a complex matter for the government to rebut the presumption of unreliability, discussed infra, by meeting the Dutton factors.[8] See, e.g., Lee v. Illinois.

8/ See United States v. Alfonso, 738 F.2d 369, 372 (10th Cir. 1984) (holding that co-conspirator statement contained sufficient indicia of reliability and was not crucial to the prosecution's case); United States v. Tille, 729 F.2d 615, 621 (9th Cir.) (statement held to be reliable because four reliability factors from Dutton were satisfied), cert. denied, 105 S. Ct. 156 (1984); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983) (statement held to be reliable because part of an ongoing transaction about which the declarant had personal knowledge),

Any attempt to circumvent the Confrontation Clause by simply designating Rule 801(d)(2)(E) as a "firmly rooted hearsay exception" ignores the plain language of the rule, the sense of Roberts, and the fundamental distinction

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cert. denied, 104 S. Ct. 3543 (1984); United States v. Layton, 720 F.2d 548, 561 (9th Cir. 1983) (statements sufficiently reliable under a Dutton analysis), cert. denied, 104 S. Ct. 1423 (1984); United States v. Ammar, 714 F.2d 238, 256-57 (3d Cir.) (sufficient indicia of reliability), cert. denied, 464 U.S. 936 (1983); United States v. Fleishman, 684 F.2d 1329, 1340 (9th Cir.) (same), cert. denied, 459 U.S. 1044 (1982); United States v. Perez, 658 F.2d 654, 661-62 (9th Cir. 1981) (testimony reliable because of surrounding circumstances); cf. United States v. Wright, 589 F.2d 31, 38 (2d Cir. 1978) (pre-Roberts case in which testimony was found to be reliable and neither crucial nor devastating), cert. denied, 440 U.S. 917 (1979); United States v. Rogers, 549 F.2d 490, 500-02 (8th Cir. 1976) (same), cert. denied, 431 U.S. 918 (1977).

between the reliability of an out-of-court statement and the right of confrontation. As this Court stated in Dutton v. Evans, 400 U.S. 74 (1970):

> [T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

Dutton, 400 U.S. at 89 (quoting California v. Green, 399 U.S. 149, 161 (1970)). The circuits which treat co-conspirator statements as within a "firmly rooted hearsay exception" have made no effort to justify this treatment as a function of the statement's reliability. See Note, Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Co-conspirator Hearsay,

53 Fordham L. Rev. 1291, 1310 (1985).

Certain hearsay exceptions have been recognized as "firmly rooted," e.g., "dying declarations," business records, public records, and prior trial testimony subject to cross-examination. Roberts, 448 U.S. at 66 n.8. In general, the hearsay exceptions would qualify for this presumption of reliability because reliability is a factor in each of the exceptions.[9] Party admissions are admitted not because of inherent reliability but because the party is directly responsible for the statement

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9/ The "catchall" exceptions, Fed. R. Evid. 803(24) and 804(b)(5), authorize the use of hearsay that carries certain indicia of trustworthiness. All of the hearsay exceptions contained in Rules 803 and 804 have reliability or trustworthiness underpinnings. See McCormick, Handbook on the Law of Evidence § 269, at 628; 5 Wigmore on Evidence §§ 1420, 1422.

and may explain it away if it is untrustworthy or untrue. Co-conspirator statements, grounded in the concept of agency admissions, are not necessarily trustworthy nor can a party simply explain away what may have been meant by another person.[10] While in many instances, co-conspirator statements which meet the criteria of admission by a preponderance of independent evidence of a conspiracy will be sufficiently reliable to satisfy the Confrontation Clause, such statements should not be considered sufficiently reliable in and

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10/ Statements of co-conspirators made in the presence of the defendant against whom they are sought to be admitted may gain some inherent reliability because of the defendant's ability to refute what is said within his or her hearing and ability to respond. See Fed. R. Evid. 801(d)(2)(B).

of themselves to justify dispensing with the defendant's right to confrontation. See United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); United States v. Ammar, 714 F.2d 238, 255 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Massa, 740 F.2d 629, 639 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); United States v. Ordonez, 737 F.2d 793, 802 (9th Cir. 1984). These courts acknowledge that the rationale for admitting co-conspirator statements has nothing to do with their inherent reliability. Rather, concerns of fairness and necessity justify the admission of statements under Rule 801(d)(2)(E). See, e.g., Ammar; Massa.

Determining Reliability

Concerns of adversarial fairness and necessity underlie this Court's recent

decision in Inadi, which dispensed with the unavailability requirement under Rule 801(d)(2)(E). United States v. Inadi, 106 S. Ct. at 1126-29. The Court reasoned that the practical burden imposed on the prosecution to locate and produce an absent declarant was not justified by the "marginal protection" to the defendant achieved by an unavailability rule. This Court indicated that the admissibility of statements under Rule 801(d)(2)(E) is not a function of their inherent reliability, nor is it really an application of agency principles. Rather, Rule 801(d)(2)(E) comprehends the tension between the government's need to gather evidence of criminal activity, and the inherent secrecy and impenetrability of criminal conspiracies.

Thus, the primary function of Rule

801(d)(2)(E) is to "obtain evidence of the conspiracy's context which cannot be replicated," or "to recapture the evidentiary significance of statements made when the conspiracy was operating in full force." Id. at 1126, 1127.

These considerations may justify allowing co-conspirator statements into evidence without a showing that the declarant is unavailable. These same considerations, however, cannot support a rule which does not distinguish between reliable and unreliable evidence. The government's compelling interest in "recapturing the evidentiary significance" of statements made during a conspiracy is not served by a rule which allows any statement into evidence, without regard to its accuracy, security or intended meaning. The potential for prejudice to the defendant under such a

system is almost unchecked.

"Reliability is the key to the hearsay rule and the confrontation clause." Haggins v. Warden, 715 F.2d 1050, 1056 n.6 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984).[11] In the case of out-of-court statements which are not inherently reliable, the trial court is obligated to decide whether they are reliable enough to admit into evidence, without giving the defendant an opportunity to test the statements by cross-examination. This is not an

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11/ The court quoted Judge Talbot Smith: "Any rule, I submit, requiring thirty-two exceptions to explain its operation is not a rule at all but a nonexistent Eudoxian universe. . . . What we really determine in our everyday lives is not whether a report is hearsay, but whether it is reliable." Smith, The Hearsay Rule and The Docket Crisis: The Futile Search for Paradise, 54 A.B.A. J. 231, 235-36 (1968).

arduous procedure. Under the four-part test established in Dutton v. Evans no denial of confrontation occurs when:

1) the statement does not contain express assertions about past facts;
2) the declarant's personal knowledge of the recited facts is established by independent evidence;
3) the statement is not likely to have been based on faulty perceptions; and
4) the circumstances surrounding the statement tend to show that the declarant had no motive to falsify the content of the statement.

Dutton, 400 U.S. at 88-89. These factors incorporate the traditionally recognized elements for reliability in hearsay or

any testimony, i.e., the quality of the declarant's memory, clarity of expression, perception and sincerity. See Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 958-61 (1974).

The determination of reliability does not require the government to shoulder an onerous burden, but rather, can be framed in terms of a showing of "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66; Fed. R. Evid. 803(24), 804(b)(5). If the declarant is available to the parties to subpoena or interview, the statements may take on a higher initial form of reliability in that the declarant can be examined to determine satisfaction of the Dutton factors. Should the factors be met, the burden would then shift to the defendant to demonstrate why reliability is still lacking.

However, if the declarant is unavailable, the government should then shoulder the burden of demonstrating why the statements have "particularized guarantees of trustworthiness" sufficient to allow their admission without confrontation by the defense. The quantum of trustworthiness that will suffice can be measured by the Dutton factors as well as whether or not the statements were some other form of cross-examined testimony of the unproduced witness, thus providing the defendant with some minimal confrontation protections.[12] As noted earlier,

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[12]/ The government should be required to make a showing that the statements satisfy all four of the Dutton factors because co-conspirator declarations contain no basis in trustworthiness, and must overcome the weaknesses of ambiguity, insincerity, faulty perception, and erroneous memory either of the declarant or the testifying witness.

Lonardo's statements as admitted against petitioner were completely unreliable. There was no reference to petitioner by name nor even any identifying characteristics and certainly the circumstances were such that Lonardo had many reasons to exaggerate or lie to Greathouse in order to consummate an eventual sale. See supra pp. 25-26.

In the absence of a showing of availability of the declarant to the defense or other forms of evidence showing that the defendant was present when the statements were made, the government must bear the burden of establishing the reliability of co-conspirator statements. Unlike civil cases where there is substantial pre-trial discovery available to both parties, criminal defendants are limited in their pre-trial access to information

by strict federal rules.[13] See Fed. R. Crim. P. 12(i) and 16; 18 U.S.C. § 3500. Consequently, most defendants are unaware of co-conspirator statements and are surprised by their introduction at trial.

The tension between the government's burden and traditional notions of confrontation must not abrogate the latter completely. Under this alternative, confrontation may be diluted but not wholly extinguished.

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[13]/ There is no definitive ruling regarding whether a defendant is entitled to the pre-trial production of statements of co-conspirators. Compare United States v. Percevault, 490 F.2d 126, 131 (2d Cir. 1974) (production of co-conspirator statements made by prospective government witnesses not required), and United States v. McMillen, 489 F.2d 229 (7th Cir. 1972) (same), with United States v. Jackson, 757 F.2d 1486 (4th Cir. 1985) (defendant entitled to disclosure if co-conspirator not a prospective government witness and disclosure does not unnecessarily reveal sensitive information).

The Dutton test cannot substitute for the right to actually confront and cross-examine adverse witneses. It can, however, provide a measure of protection for the defendant who is confronted at trial, not by his accuser, but by a "very large box of tapes." Inadi, 106 S. Ct. at 1135 (Marshall, J., dissenting). In this situation, the Confrontation Clause minimally requires that co-conspirator declarations be examined for "indicia of reliability." As this Court recently stated in Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986):

> [T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and the accuser

> engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown--and hence unchallengeable--individuals.

CONCLUSION

The Judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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